

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION  
CHAMBER SUMMONS NO. 1759 OF 2003  
AND  
CHAMBER SUMMONS NO. 139 OF 2004  
IN  
SUIT NO. 3086 OF 2003

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IN

SUIT NO. 3086 OF 2003

Infrastructure Leasing & Financial

Services Limited. .. Plaintiffs.

vs.

DSQ Holding Ltd., & Ors. .. Defendants.

Mr. A.K. Abhyankar with Ms. Hemani Jhariya for  
Defendant Nos. 1 & 2 in support of Ch/s.

Mr. Virag V. Tulzapurkar i/by Negandhi  
Shah & Himaytullah for plaintiff  
to show cause.

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CORAM : S.U. KAMDAR, J.

DATE: 9TH MARCH, 2005

ORIGINAL JUDGMENT :

1. These two chamber summons are initiated by both the plaintiffs as well as the defendants. The defendant has taken out the chamber summons being Chamber Summons No. 1759 of 2003 for revocation of leave under clause 12 of Letters Patent and the plaintiffs have taken out Chamber Summons No. 139 of 2004 for amendment of the plaint by insertion of certain words in paragraph 23 of the plaint which deals with the jurisdiction of this Court. In my view, it is necessary to consider Chamber Summons No. 1759 of 2003 taken out by the defendants first so as to ascertain whether as on the date of the filing of the suit and of obtaining leave under clause 12 of the Letters Patent this Court, on

averments made in the plaint, had jurisdiction to entertain and try the present suit. If this Court had jurisdiction then consequently Chamber Summons No. 1759 of 2003 must fail and if this Court had no jurisdiction as on the date of the filing of the suit then Chamber Summons No. 139 of 2004 must succeed and the leave has to be revoked. If there was no jurisdiction to the Court on the date of the filing of the suit then by virtue of subsequent amendment in paragraph 23 of the plaint which deals with jurisdictional issue, the plaintiff cannot add the averments so as to give this Court jurisdiction which was not existing as on the date when leave was obtained under clause 12 of the Letters Patent.

2. Brief facts of the case which are relevant to determine the aforesaid issues are as under :-

3. The plaintiffs are a financial institution and has filed a suit in this Court for the recovery of sum of Rs. 3,72,87,086/- with interest thereon at the rate of 15.75% per annum. Under prayer clause (c) of the plaint, the plaintiff has sought a declaration that the amount due to the plaintiffs are secured by valid, subsisting and binding equitable mortgage of the properties of the defendant nos. 3 to 5 more particularly described in Exhibits "M-1" to "M-3". By prayer clause (d) of the plaint the plaintiffs had prayed that on the

defendants failing to redeem the said mortgaged property within the time limit stipulated by this Court, the said property should be sold under the orders and directions of this court and net sale proceeds should be applied towards the satisfaction of the plaintiffs claim mentioned in the suit.

4. Paragraph 23 of the plaint, as it stood as on the date of the filing of the present suit which deals with the jurisdictional aspect of the case reads as under :-

"23. The Plaintiffs are carrying on business inter alia at Mumbai. The payment were to be made to the Plaintiffs under the aforesaid facilities at Mumbai and sum of Rs. 6,41,253/- was infact paid at Mumbai. A material part of the cause of action has arisen at Mumbai. However, the Defendants carry on business outside Mumbai. The Agreements were executed outside Mumbai. The mortgaged properties are situated outside. That part of the cause of action has arisen outside Mumbai. This Court will have therefore jurisdiction to entertain and try the present suit upon leave being granted under Clause XII of the Letters Patent this Hon'ble Court being granted to the Plaintiffs, which is separately applied

for."

5. The present suit arises out of the amount of loan lent and advanced by the plaintiffs to the defendant no. 1. The said amount was advanced against the pledge of equity shares in favour of the plaintiffs and agreement-cum-pledge-cum guarantee. In respect of the said amount various securities are furnished by the defendant in favour of the plaintiffs, namely, shares of DSQ Software Ltd., DSQ Biotech Ltd., Digital Equipment, etc. Under Exhibit M-1, M-2 and M-3 immovable properties of the defendant nos. 3 to 5 situated at Pondichery are the subject matter of equitable mortgage in favour of the plaintiffs herein. The present suit is instituted inter alia to enforce the aforesaid securities in respect of the said immovable properties. In the present case before filing the suit in this Court on 19.9.2003 a leave petition was filed under Clause 12 of Letters Patent and leave was sought of this Court to institute the suit at Mumbai. Paragraph 3 of the said Leave Petition on the basis of which the said leave petition under Clause 12 was granted reads as under :-

"3. The claim in the present suit is for recovering the amounts due under the Agreements entered into between the Petitioners and the Defendant No. 1, under

the Guarantee executed by the Defendants No. 2 in favour of the petitioners and for the enforcement of mortgages created by the Defendants Nos. 3 to 5 on their properties to secure the due repayment by the Defendant No. 1 to the Petitioners of the moneys advanced to Defendant No. 1. The payments under the said facilities were to made by the Defendants to the Petitioners in Mumbai. In fact part-payment was made by the Defendants No. 1 to the Petitioners at Mumbai. A material part of the cause of action has thus arisen at Mumbai. However, the aforesaid Agreements were executed outside Mumbai and the mortgaged properties are situated outside Mumbai. That part of the cause of action has arisen outside Mumbai. The Defendants also carry on business outside Mumbai. The Court will therefore have jurisdiction to entertain and try the present suit upon leave being granted under Clause XII of the Letters Patent. Additionally, it has been specifically agreed by and between the parties that all disputes shall be subject to Mumbai Jurisdiction only."

6. This Court had granted leave on 19.9.2003 and pursuant thereto the suit is instituted in this

Court. In Chamber Summons No. 1759 of 2003 the defendant has claimed that the suit as framed and filed in this Court is not maintainable as this Court had no jurisdiction to try and entertain the suit.

7. Mr. Abhyankar, the learned counsel appearing for the defendant in support of the chamber summons has contended before me that the present suit is in respect of the suit for land and, therefore, the suit must be instituted where the immovable property is situated. It has been further contended that only if there are more than one immovable properties involved and some of them are situated within jurisdiction of this Court then alone on leave being obtained under Clause 12 of the Letters Patent this Court shall have jurisdiction to entertain and try the suit in this Court. According to the learned counsel for the defendant, the suit for enforcement of the mortgage ultimately affects the right, title and interest in the property because on sale being effected by the Court in execution of a decree the title is likely to be transferred and/or passed in favour of the auction purchaser. According to the learned counsel for the defendant, thus the said suit is for the land and, therefore, the present suit could not have been filed in this Court where admittedly none of the immovable properties are situated within the limits

of jurisdiction of this Court. The learned counsel has drawn my attention to aforesaid paragraph 23 of the plaint and has contended that on their own showing in paragraph 23 the suit properties of which the enforcement of mortgage is sought, is situated outside the territorial jurisdiction of this Court and, therefore, this Court has no jurisdiction to entertain and try the present proceedings. The learned counsel has in support of his contention relied upon the judgment of the Calcutta High Court in the case of Bepin Behary Law v. Mohit Kumar Pal and others reported in AIR (29) 1942 Calcutta 496 and has contended that if all the properties are situated outside the jurisdiction in respect of which enforcement of mortgage is sought then in that event the suit cannot be instituted in this Court by obtaining leave under Clause XII of the Letters Patent. He has further contended that only if there are some of the properties situated within the jurisdiction of this Court, then the Court is empowered to grant leave under Clause XII of the Letters Patent and on leave being granted, this Court would have jurisdiction. In the present case, according to the learned counsel for the defendant, all the properties are situated being Exhibit M1 to M3 at Pondichery and are not situated within the jurisdiction of this Court, and, therefore, this Court has no jurisdiction to grant leave and institute the suit.

8. On the other hand, the learned counsel for the plaintiff has contended that the suit as framed as on the date of the filing of the suit even without taking into consideration the amendment was correctly filed in this Court. He has referred to paragraph 23 of the said plaint and has contended that the averments made in paragraph 23 inter alia provides that payment under the agreement for the amount of loan lent and advanced was required to be made at Bombay and in fact some of the payments were effected at Bombay is in itself sufficient to give this Court the jurisdiction to entertain and try the present suit. He has further contended that the contention of the defendant that the suit for enforcement of the mortgage is for land is erroneous in as much as the suit for recovery of debt by enforcing mortgaged properties is not a suit for the land but it is only a suit for recovery of the amount lent and advanced by the plaintiffs to the defendant. In support of the aforesaid submission, the learned counsel for the plaintiffs has relied upon the judgment of the 5 Judge Bench of the Bombay High Court in the case of *Hatimbhai Hassanally v. Framroz Eduljee Dinshaw* reported in AIR 1927 Bombay page 278 and it has been contended that the suit for enforcement of mortgage is not a suit for land but it is only a suit for recovery of debt due and payable by the defendant to the plaintiff herein.

The learned counsel has relied upon paragraph 75 of the judgment which summarises the majority opinion in the present case. The said paragraph 75 of the judgment reads as under :-

"75. Summarising, then, my conclusions on the whole case, I would hold that just as the primary element in a mortgage is the debt and not the security so the primary or substantial object of a mortgage suit is the payment of the debt, and that the sale sought for is merely ancillary to the main or final end viz., the payment of the mortgage debt. Consequently, in my judgment a mortgage suit of that nature is not a suit for land within the meaning of Cl. 12 of the Letters Patent, any more than an administration suit is. If that opinion, which is in accordance with the past practice of this Court for some fifty-four years prior to *India Spinning and Weaving Co., Ltd. v. Climax Industrial Syndicate* (24) is in fact erroneous, then I am content to err in company with Sir Charles Sargent, Sir Charles Earran and Sir Basil Scott in this Court, and I believe in company with Sir Lancelot Sanderson in the High Court of Calcutta. Further, as it would seem to me, the judgments of Sir Lawrence Jenkins and

Sir Victor Coutts-Trotter support that practice, rather than the reverse."

9. By relying upon the aforesaid judgment, the learned counsel has contended that the suit for mortgage is not a suit for land. The learned counsel has further contended that the judgment relied upon of the Calcutta High Court cannot be accepted in view of the Five Judge Bench decision in the aforesaid case of *Hatimbhai Hassanally v. Framroz Eduljee Dinshaw* (supra), and, therefore, the suit for enforcement of the mortgage is not a suit for land but is only for the recovery of debt due and payable by the defendant to the plaintiff in respect of the loan lent and advanced by enforcement of the mortgage. In view of the aforesaid decision of the Five Judge Bench of this Court in the case of *Hatimbhai Hassanally v. Framroz Eduljee Dinshaw* (supra), I am of the opinion that it is not permissible for me to accept the contention of the defendant that the suit for enforcement of the mortgage is a suit for land. In view of the aforesaid position, I reject the contention of the learned counsel for the defendant in that behalf.

10. The learned counsel for the plaintiff has thereafter relied upon a judgment of the Apex Court in the case of *A.B.C. Laminart Pvt. Ltd.*, and another vs. *A.P. Agencies, Salem*, reported in AIR

1989 SC 1239 and has contended that the agreement where the payment has to be made and in fact made is a part of cause of action and if that part of cause of action has arisen within the territorial jurisdiction of this Court then the material part of the cause of action has arisen in the territorial jurisdiction of this Court, and, thus, in the present case, this Court has jurisdiction to entertain the suit. Paragraph 15 of the said judgment reads as under :-

"15. In the matter of a contract there may arise causes of action of various kinds. In a suit for damages for breach of contract the cause of action consists of the making of the contract, and of its breach, so that the suit may be filed either at the place where the contract was made or at the place where it should have been performed and the breach occurred. The making of the contract is part of the cause of action. A suit on a contract, therefore, can be filed at the place where it was made. The determination of the place where the contract was made is part of the law of contract. But making of an offer on a particular place does not form cause of action in a suit for damages for breach of contract. Ordinarily, acceptance of an offer and its intimation result in a

contract and hence a suit can be filed in a court within whose jurisdiction the acceptance was communicated. The performance of a contract is part of cause of action and a suit in respect of the breach can always be filed at the place where the contract should have (been) performed or its performance completed. If the contract is to be performed at the place where it is made, the suit on the contract is to be filed there and nowhere else. In suits for agency actions the cause of action arises at the place where the contract of agency was made or the place where actions are to be rendered and payment is to be made by the agent. Part of cause of action arises where money is expressly or impliedly payable under a contract. In cases of repudiation of a contract, the place where repudiation is received is the place where the suit would lie. If a contract is pleaded as part of the cause of action giving jurisdiction to the Court where the suit is filed and that contract is found to be invalid, such part of cause of action disappears. The above are some of the connecting factors."

11. In the present case, admittedly, the payment

was to be made at Bombay and in fact according to the plaintiff some of the payments are made at Bombay and, therefore, this Court shall have jurisdiction to entertain and try the present suit. Since I have held that the suit is not a suit for land, the leave application for Clause XII of the Letters Patent will have to be considered on the basis of the territorial jurisdiction where the cause of action has arisen in the present case the part of the cause of action has arisen in Bombay and, therefore, this Court has jurisdiction to entertain and try the present suit. Moreover, in the present case, there is an agreement between the parties that for the purpose of jurisdiction Mumbai Court shall alone have jurisdiction. The said clause 26 of the agreement reads as under :-

"26. Without prejudice to the rights of IL&FS to enforce certain provisions of this pledge without intervention of the court and to exercise certain other remedies as set out herein, the provisions of this Agreement shall be governed by Indian Law. All disputes shall be subject to Bombay jurisdiction only."

12. In view of the aforesaid clause 26 also this Court shall have jurisdiction to entertain and try the present suit. In view of the fact that part of

the cause of action has arose in Mumbai and that both the parties have by an agreement conferred an exclusive jurisdiction to the Courts in Bombay in respect of disputes between the parties. In light of the present facts, I do not find any merit in Chamber Summons No. 1759 of 2003 and, accordingly, I dismiss the same.

13. Once I have held that the suit is rightly instituted in this Court and this Court has jurisdiction to entertain the said suit as on the date of the filing thereof, then in that event, I find no reason why the Chamber Summons No. 139 of 2004 seeking amendment to paragraph 23 of the plaint should not be granted. The said paragraph 23 is sought to be amended according to the learned counsel for the plaintiff, because of certain errors which are crept in wherein it has been stated that the agreement for mortgage is executed outside Mumbai. According to him, in fact the agreement is executed by the defendant in Pondichery and the same was thereafter sent to Mumbai where the plaintiff has executed the same. Thus according to the plaintiff, the agreement is concluded at Bombay and, therefore, this Court also has jurisdiction. It is well settled that normally the amendment to the plaint should be liberally granted by the Court by exercising power under Order 6 Rule 17 unless any vested right of the other party is sought to be

deprived and/or taken away. Please see the judgment of the Apex Court in the case of Pankaja And Another vs. Yellappa (Dead) by LR's and others reported in (2004) 6 SCC 415. In view of the aforesaid position in law, I grant the amendment and accordingly make the chamber summons No. 139 of 2004 absolute in terms of prayer clause (a). However, there shall be no order as to costs.